# THE DOCTRINE OF DUE PROCESS OF LAW BEFORE THE CIVIL WAR.

DURING the last court year the United States Supreme Court decided sixty-five constitutional cases; eight of these arose under the Obligation of Contracts clause, twenty-one under the Commerce clause, and twenty-four under the Fourteenth Amendment, or, more specifically, under that clause of the Fourteenth Amendment which declares that no state shall "deprive any person of life, liberty, or property without due process of law." [1] In other words, the most important clause of the United States Constitution judged as a restriction upon the legislative power of the states is the Due Process of Law clause of the Fourteenth Amendment. Equally interesting is the fact that this importance is comparatively recent. The Fourteenth Amendment was added to the Constitution in 1868. Between 1868 and 1889 seventy-one cases arose under the entire amendment. Between 1890 and 1901, on the other hand, 197 cases arose under the amendment, and that amounts to saying under the clause just quoted.[2] Again, while the American Digest for 1887 contains but 11 items upon Due Process of Law out of 274 items upon the subject of constitutional law, the same publication for 1902 contains 109 items upon Due Process of Law out of a total of 470 items upon constitutional law; and furthermore, a large proportion of the remainder of these 470 items are upon topics related to and growing out of the modern concept of Due Process of Law.[3]

Nor is the significance of these statistics difficult to discover when we understand what the modern concept Due Process of Law is. In the now famous case of Lochner *v.* State of New York [4] the issue was the validity of the statute limiting employment in bakeries to sixty hours a week and ten hours a day. Complainants in error

[1] E. Wambaugh, Constitutional Law in 1909–10, 4 Am. Pol. Sci. Rev. 483–97.

[2] See the Annotated Constitution of the United States in any House or Senate Manual.

[3] Am. Dig. of dates mentioned, Tit. "Constitutional Law."

[4] 198 U. S. 45.

contended that this statute comprised an unreasonable and arbitrary regulation of an innocuous trade and was therefore not within the police power; and they propounded the following questions, which, they contended, the state must answer satisfactorily, in order to justify such an enactment as the one in question: "Does a danger exist which the enactment is designed to meet? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the objects sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?" The range of inquiry which the court is thus invited to enter into is obviously almost indefinite. Nevertheless it would seem from the language of Justice Peckham's opinion, pronouncing the statute under review void, that the court accepted the invitation. A salient passage of this opinion runs as follows:

"It must of course be conceded that there is a limit to the valid exercise of the police power by the state . . . otherwise the Fourteenth Amendment would have no efficacy in the legislatures, and the legislatures of the state would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation a claim might be. The claim of the police power would be a mere pretext, — become another and elusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint. . . . In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the federal court is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"

It is true that the decision in the Lochner case was rendered by a vote of five to four, but it would seem from a careful examination of their language that the dissenting judges were not protesting so much against the idea that due process of law means reasonable law, or, in other words, the court's opinion of reasonable law, as against the view that the statute before them was unreasonable.

I have elsewhere traced the development of the Due Process of Law clause of the Fourteenth Amendment.[5] That development, however, has a certain background in the history of our constitutional law anterior to the Civil War. My purpose in this paper is to show what that background is.

## I.

The phrase "due process of law" comes from Chapter 3 of 28 Edw. III, which reads as follows:

"No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law."

This statute in turn harks back to the famous Chapter 39 of *Magna Carta*, which the Massachusetts Constitution of 1780 paraphrases thus:

"No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." [6]

The important phrase in this passage for our purposes is of course "by the law of the land," which is made by Sir Edward Coke in his Institutes synonymous with the later phrase, "by due process of law," and that in turn to signify "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by writ original of the common law." [7] It must not be thought, however, that in writing thus Coke is recording the facts of history. Rather, to quote a recent authority upon *Magna Carta*, he was but "following his vicious method of assuming the existence in *Magna Carta* of a warrant for every legal principle established in his own day," a method which has enabled him to mislead utterly "several generations of commentators." [8] Among those thus misled are the three great commentators on American constitutional law, Kent, Story, and Cooley, — willing dupes no doubt, yet dupes none the less.[9]

[5] 7 Mich. L. Rev. 642. [6] Declaration of Rights, Art. XII. [7] Inst. II, 50–1.
[8] McKechnie, *Magna Carta*, 447; *ibid.*, generally on "Chapter 39."
[9] 2 Kent, Comm., 2 ed., 13; Story, Comm., 4 ed., § 1789; Cooley, Const. Lim., 2 ed., 351 *et seq.*

It will not be amiss perhaps to raise the question whether Coke regarded "the law of the land," as he defined it, as beyond the power of parliamentary alteration, an inquiry which leads us to the great parliamentary inquest upon "the liberty of the subject" which, growing out of the arrest of the five knights, found ultimate fruition in the Petition of Right of 1628.[10] The question at issue at this time between Parliament and the King was whether the latter in ordering an arrest must assign a cause the validity of which it would accordingly devolve upon the judges finally to determine. The parliamentary lawyers, among whom was Coke, in support of their contention that such assignment of cause must be made, propounded the following argument: "And for the words '*per legem terrae*' original writs only are not intended, but all other legal process, which comprehended the whole proceedings of the law upon a cause other than trial by jury . . . and no man ought to be imprisoned by special command without indictment, or other due process to be made by the law." [11] The phrase "to be made by the law," taken in connection with the purpose of Parliament's protest, which was to keep "the regal power" "a legal power," seems plainly to leave Parliament itself unhampered.

There is, however, another phase of the matter which demands brief consideration. By "law of the land" Coke and his associates meant apparently merely such way of proceeding on the part of the monarch, when moving against individuals, as the law, whether ancient custom, the common law, or statute, ordained and established. But now the source of the guaranty that the monarch should thus proceed was *Magna Carta*. It therefore behooved the parliamentarians to exalt *Magna Carta* as much as possible, or, to quote Sir Benjamin Rudyard, to make "that good old decrepid law of *Magna Carta*, which hath been so long kept in and bed-ridden, as it were, . . . walk abroad again." [12] *Magna Carta* is accordingly pronounced the source of the fundamental rights of English subjects, is treated as irrepealable, and, finally, as incompatible with the notion of sovereignty anywhere in the realm: "*Magna Carta* is such

[10] 2 Parliamentary History, especially cols. 262–362.

[11] *Ibid.*, cols. 263–4. See also "Mr. Attorney," at col. 306, with reference to a "precise statute"; also Littleton, at cols. 319–20; also same at col. 323.

[12] *Ibid.*, col. 335. In same connection, see Edward Jenks, "The Myth of *Magna Carta*," Independent Review, March, 1904.

a fellow that he will have no sovereign." [13] Years earlier than this, moreover, Coke himself had in Dr. Bonham's Case [14] declared specifically that the common law would on occasion control an act of Parliament if the latter were contrary to common right and reason, and adjudge it to be utterly void. From the general idea, however, of Parliament's power as limited by a fundamental law which had found embodiment in *Magna Carta* as a whole to the more definite proposition that it was limited by the "law of the land" clause of Chapter 39 was but a step; and it is interesting to note that that step was actually taken by some of Coke's contemporaries, to wit, in the case of Captain John Streater,[15] who, having been arrested by order of the Commonwealth Parliament, set up the contention in an application for a writ of *habeas corpus*, that such an order was not "law of the land." The argument was rejected by the court: "If the Parliament should do one thing and we the contrary here," said the judges, "things would run round. We must submit to the legislative power." But though rejected, Streater's argument, which is based almost exclusively upon passages drawn from Coke's various writings, serves to show what construction Coke's language is susceptible of when viewed from the proper angle.

## II.

The early state constitutions did not contemplate judicial review, but they were considered none the less as setting certain limitations upon legislative power, the transgression of which by the legislature would destroy, to use an oft-quoted phrase from Vattel, "the basis of the legislature's own existence," [16] thus giving rise to the right of revolution on the part of the people. Did, then, the phrase "law of the land," which is the universal form in these constitutions, import any limitation upon legislative power? There are three good reasons for thinking not. In the first place, "the judgment of peers," signifying in our constitutional usage trial by jury, which is usually alternative to "law of the land" and therefore

[13] Parliamentary History, col. 357. For Pym's point of view, see McIlwain, High Court of Parliament, 83.

[14] 8 Rep. 118. [15] 5 State Trials, 386 *et seq.*

[16] See Mass. Circular Letter of 1768, MacDonald, Documentary Source Book, 146–50.

apparently displaceable by it,[17] is often further safeguarded by a clause rendering it inviolable in all cases in which it had hitherto been used,[18] a clause to which the members of the legislature were sometimes required to take special oaths of fidelity.[19] In the second place, moreover, if "law of the land" meant something else than statutory enactment, that something could have been only the common law, which, however, is adopted in these same constitutions, when specific mention is made of it, only until the legislature may choose to alter it.[20] Finally, in the early days of judicial review, a number of cases arose in which the Law of the Land clause would certainly have been brought forward had it been deemed available as a constitutional restriction upon legislative power.[21] The argument from silence is often of dubious value, but in a case of this sort it is almost conclusive.

One of the two earliest constitutional cases under the Law of the Land clause arose in North Carolina in 1794,[22] in connection with the statute authorizing the Attorney-General of the State to take judgments against the receivers of public moneys upon motion and without notice to the delinquents. At first the opinion of the single judge sitting was adverse to the statute, but "next day at the sitting of the court, Haywood, Attorney-General, moved the subject again," contending that the clauses of the constitution that had been invoked were "declarations the people thought proper to make of their rights, not against a power they supposed their own

[17] American Charters, Constitutions, and Organic Laws (F. N. Thorpe ed.), 569, 1687, 1891, 2455, 2473, 2788, 3277. See also, for existing provisions of this character, Cooley's Const. Lim. 351–3, note 1; and Frederick J. Stimson, Federal and State Constitutions, §§ 130–1.

[18] The original Maryland, New Hampshire, North Carolina, and South Carolina constitutions answer this description: American Charters, etc., *supra*, 1687 and 1688, 2455 and 2456, 2787 and 2788, 3277 and 3278; the Pennsylvania Constitution of 1776 is similar, p. 3083. See also *ibid.* 785, 2598, and 2637; Stimson, *supra*, § 72.

[19] This was the case in the original New Jersey Constitution, American Charters, etc., *supra*, 2598.

[20] The original Delaware, New Jersey, and New York constitutions contain this sort of provision. American Charters, etc., *supra*, 566, 2598, 2635. The absence of a similar provision from the other contemporary constitutions is acknowledgment that the power of sifting, continuing, or repealing the common law lay with the legislature. See also *ibid.* 680, 1713, 1742, 1780, 2613, 2649, 2655.

[21] Bayard *v.* Singleton, 1 Martin (N. C.) 42, 47 (1787); Bowman *v.* Middleton, 1 Bay (S. C.) 282 (1792); Van Horne *v.* Dorrance, 2 Dall. (U. S.) 309 (1795); Cooper *v.* Telfair, 4 Dall. (U. S.) 14 (1800).

[22] —— *v.* State, 2 Hayw. (N. C.) 29, 38.

representatives might usurp, but against oppression and usurpation in general." Historically, he argued, the term "law of the land" had a double significance: first, it was a protest on the part of those who drafted *Magna Carta* against the attempt of King John to introduce the civil law into England, and secondly, it was a protest against royal action "by a pretended prerogative against or without the authority of law." In the North Carolina constitution therefore the *lex terrae* signified simply "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own legislature." After some hesitation two of the three judges accepted the Attorney-General's point of view.

The result arrived at by the North Carolina Superior Court in 1794 was reached independently by the New Hampshire Supreme Court nearly a quarter of a century later in Mayo *v.* Wilson,[23] in which a statute authorizing selectmen and tything-men to arrest persons suspected of traveling unnecessarily on the Sabbath was challenged upon the ground that under the Law of the Land clause of the State Constitution arrests could be made only by virtue of writs of duly constituted courts or warrants under the hand and seal of the magistrates. Said the court: "If this be the true construction of the constitution, the law in question is most clearly invalid, for it certainly purports to authorize an arrest without writ and without warrant from the magistrate." But is this the true construction? First, upon the basis of a review of Coke's and Sullivan's treatment of the same clause in *Magna Carta*, and secondly, upon the basis of an examination of the general principles upon which society is founded, the court comes to the opinion that "the fifteenth article in our Bill of Rights was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by the law," expressing "the will of the whole." It should be noted in passing that the entire objection to the New Hampshire statute was to the method of its enforcement and not at all to its substance.

But admitting the Law of the Land clause to limit the power of the legislature, when would it limit it? The context in which the clause is invariably found in the early state constitutions signifies that its reference is to procedure in the enforcement of penalties.[24]

[23] 1 N. H. 58.

[24] See references in note 17, *supra*. See also the opinion of the Attorney-General Rawlin of Barbadoes (1720?), Chalmer's Opinions, 373–82.

If therefore it limited the power of the legislature, it was when the legislature was delineating the process by which its measures, imposing penalties for their violation, were to be enforced. At this point the choice of the legislature would be restricted: it must select those methods of procedure which were known to "the law of the land." Such is the point of view of the South Carolina Supreme Court in the case of Zylstra *v.* Corporation of Charleston,[25] which was decided in 1794, the same year as the North Carolina case just reviewed. The plaintiff Zylstra had been arrested for violating a city ordinance which forbade the keeping of a tallow-chandler's shop within the corporation limits and, being subsequently convicted by the court of wardens without the intervention of a jury, had been fined £100. Again, it should be observed that plaintiff's objections are leveled not at all against the body of the ordinance in question, that is, against the prohibition enacted against the further pursuit of his livelihood within the city limits, but solely against the manner in which that prohibition was enforced. Even so, the court was hesitant to pass upon the constitutional issue, half of the bench basing their decision in favor of plaintiff upon the terms of the municipal charter. Waties, J., was more audacious, and construing the Law of the Land clause to consecrate the procedure known to the common law, pronounced the jurisdiction of the Court of Wardens unconstitutional. This view turned out, however, to be too stringent for any practical use, wherefore it was ultimately so far modified as to sanction the procedure that has been in existence at the time of the adoption of the state constitution,[26] — an illogical doctrine surely, since on the one hand it admits the necessity of legal development, but on the other hand cuts it short at a point which, from the standpoint of such necessity, is a perfectly arbitrary one.

"Law of the Land" and "Due Process of Law," however, derive their great contemporary importance not from their character as restrictions upon the power of the legislature in the enactment of procedure merely, but from their character as restrictions upon the power of legislation in general.[27] Not everything that is passed in

[25] 1 Bay (S. C.) 384.

[26] See particularly State *v.* Simons, 2 Spears 761 (1836); the definition there given on page 767 by O'Neill, J., anticipates Justice Curtis' definition in Murray *v.* Hoboken Land & Improvement Co., *infra*.

[27] Such use was originally suggested for the Trial by Jury and Due Compensation

the form of law is "law of the land," say the courts, not only with reference to enactments which have nothing to do with the subject of procedure, but even with reference to enactments sanctioned by methods of enforcement admittedly unexceptionable, as, for example, the statute involved in the Lochner case. How has this come about? The essential fact is quite plain, namely, a feeling on the part of judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow. But such a feeling is of course not in itself constitutional law: the question is, therefore, how did it become such? Before we can take up this question we have to dispose of some collateral matters.

The first great achievement of the courts in the interpretation of the written constitution was the establishment of judicial review; but that being done, the great problem toward the solution of which this same achievement is but the first contribution still remained, namely, the problem of the rightful limits of legislative power, particularly in dealing with property rights. During the Revolution and the years immediately following, the state legislatures had put through a number of reforms that had borne down upon various proprietary interests rather severely: the Northern legislatures had adopted measures looking to the gradual abolition of slavery within their respective jurisdictions; the Southern legislatures had abolished primogeniture; the reforming legislature of Virginia, after first disestablishing the Episcopal Church in that state, had twice reorganized it and had concluded, in 1801, by appropriating certain of its lands to the state.[28] Meantime, other exigencies than reform had, in the course of the years 1785–87, produced still more drastic legislation — "rag money" measures in a majority of the states and laws impairing the obligation of private contracts in still more;[29] so that when the Constitutional Convention met in Philadelphia in May, 1787, Madison attributed its convening less

clauses; see Madison on Paper Money, November, 1786, Writings (Hunt) II, 280. Also see notes 82 and 107, *infra*.

[28] For a general account of this legislation see Fiske, Critical Period, 70–82. For a sketch of the Virginia Church Acts see Terret *v.* Taylor, 9 Cranch (U. S.) 43 (1815), 47–8.

[29] See Fiske, *supra*, 168–86; A. C. McLaughlin, Confederation and the Constitution, Ch. IX; 1 McMaster, History of the People of the United States, Ch. III.; Story, Comm., § 1371; Marshall in Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122.

to the necessity of remedying the deficiencies of the Articles of Confederation for national purposes than to the necessity of providing some effective security for private rights against legislative attack.[30] Finally, in virtue of notions inherited from Colonial days, which were further confirmed by the prevalent analogy between the state legislatures and the British Parliament, these bodies were prone, during the early years of our constitutional history, and some of them for years afterward, to all sorts of "special legislation" so called; that is, enactments setting aside judgments, suspending the general law for the benefit of individuals, interpreting the law for particular cases, and so on and so forth.[31] So long, of course, as there were Tories to attaint of treason this species of legislative activity had some excuse, but hardly was this necessity past than it came into great disrepute even with some of the best friends of democracy, by whom it was denounced not only as oppressive but as not properly within legislative power at all.[32]

But how was criticism upon legislative power converted into effective constitutional law? The answer is to be found in the doctrine of *vested rights*, which is the foundational doctrine of constitutional limitations in this country, and which in turn rests, not upon the written constitution, but upon the theory of fundamental and inalienable rights. Setting out with the definition of a vested right as a right which a particular individual has equitably acquired under the standing law to do certain acts or to possess and use certain things, the doctrine of vested rights regards any legislative enactment infringing such a right, whether by direct intent or incidentally, without making compensation to the individual affected, as inflicting a penalty *ex post facto*.[33] Article I, Section 10,

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[30] See Madison's long speech of June 6 in the Convention, in his Notes; also his letter of October 24, 1787, to Jefferson, giving an account of the Convention; also Federalist 44 (Lodge ed.).

[31] For examples note the following cases, cited *infra*, Calder *v.* Bull, Cooper *v.* Telfair, Holden *v.* James, Merrill *v.* Sherburne, Dash *v.* Van Kleek, Van Horne *v.* Dorrance's Lessee, Satterlee *v.* Matthewson, Norman *v.* Heist, and others referred to in footnotes.

[32] See Federalist, 48, quoting from Jefferson's notes on Virginia.

[33] The definition of a "vested right" is essentially that given by Chase, J., in Calder *v.* Bull, modified by Parker, C. J., in Foster *v.* Essex Bank, 16 Mass. 245 (1819), that there is no such thing as a "vested right to do wrong." Special legislative exemptions for which consideration is lacking should also be excepted from the definition. See Beers *v.* Ark, 20 How. (U. S.) 527 and cases cited. Also certain remedial statutes,

of the federal Constitution prohibits the states from passing *ex post facto* laws, and there is good evidence for believing that some of those who were instrumental in framing this provision intended it to forbid practically all sorts of retrospective laws.[34] In Calder *v.* Bull,[35] however, partly upon the strength of Blackstone's authority and partly for reasons of expediency, the Supreme Court ruled that the prohibition in question extended not to civil cases but to penal cases only. But now it is exactly the purport of the doctrine of vested rights to obliterate this very distinction between civil and penal legislation; and what is more paradoxical still, the first difficult step to this end was taken in the leading opinion in Calder *v.* Bull, that of Chase, J., who set forth in a *dictum* that must be regarded as stating the leavening principle of American constitutional law, the notion that legislative power, quite independently of the written constitution, is not absolute, but is constrained both by its own nature and by the principles of republican government, natural law, and the social compact. It is true that these views did not pass unchallenged, for Iredell, Chase's own associate, pronounced them those of a "speculative jurist," insisting that in a constitution which should contain no other provisions than those organizing the three branches of government, the legislative would be omnipotent. But, Iredell's disparaging tone to the contrary notwithstanding, Chase is to be regarded as foreshadowing the doctrine of Kent, Story, and, to some extent, that of Marshall, besides that of a host of lesser contemporaries, — in a word, the main trend of American constitutional decisions for a generation.

And indeed from the very moment, as Chase shortly afterwards testified without contradiction in Cooper *v.* Telfair,[36] state legislation began to be subjected generally to "new and more rigorous tests," which, a few years anterior, little of it that was of major importance could have survived. An excellent illustration is fur-

1 Kent, Comm. 455. In general, see T. M. Cooley in 12 Cent. L. Journ. 2–4: Cooley admits that the validity of legislation in this class of cases [retrospective laws] depends upon the view the court may take of its justice, and thinks this an unsatisfactory state of the law. Cooley follows the early cases largely. On the general subject see W. G. Meyer, Vested Rights, St. L. 1891. See also H. C. Black in 25 Am. L. Reg. N. S. 681 *et seq.*

[34] See Madison's Notes, under the dates of August 22 and 28; Dickinson's speech on the subject, August 29; Mason's, on September 14. Also see Federalist 44.

[35] 3 Dall. (U. S.) 386 (1798).

[36] 4 Dall. (U. S.) 14 (1800).

nished by the conversion of the Court of Appeals of Virginia, which between the years 1797 and 1802 advanced the doctrine of vested rights from a mere interpretative principle of general statutes [37] to a positive limitation upon legislative power and passed from giving, in the earlier of these years, the most sweeping possible application to the law forbidding entails [38] to the very verge of overturning the law disposing of the church lands, which was saved by the merest accident.[39] Another interesting illustration of the same character is afforded by the argument of the Supreme Court of Massachusetts in the case of Wales *v.* Stetson,[40] which gives the doctrine of vested rights the same effect as Marshall later gave the Obligation of Contract clause in the Dartmouth College case. This was in 1806. Eight years later the same court decided in Holden *v.* James [41] that notwithstanding the fact that the twentieth article of the state constitution contemplates a power inhering in the legislature to suspend the laws, such suspensions must be general, it being "manifestly contrary to the first principles of civil liberty, natural justice, and the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances." Five years later the New Hampshire Supreme Court laid down a similar doctrine upon the basis of the theory of the separation of powers, which had found clear and dogmatic expression in the New Hampshire Constitution of 1784.[42] Meanwhile, in 1811 the doctrine of vested rights was given its classic statement by Chancellor Kent in the famous case of Dash *v.* Van Kleek,[43] which was bottomed squarely upon Chase's *dictum* in Calder *v.* Bull.

But it is most important for our purposes to note the constrictive effect of the doctrine of vested rights, particularly in the New York courts, upon the large acknowledged powers of eminent domain and police regulation, and, contrariwise, its expansive effect in the

[37] See Elliott *v.* Lyell, 3 Call (Va.) 268 (1802), following Lord Mansfield in Couch *v.* Jeffries, 4 Burr. 2460 (1769).

[38] Carter *v.* Tyler, 1 Call (Va.) 165 (1797).

[39] Turpin *v.* Lacket, 6 Call (Va.) 113 (1802). The accident referred to was the death of Pendleton, J., the night before the day of the decision. Had he survived the court would have stood 3 to 2 against the statute.

[40] 2 Mass. 145. *Cf.* 1 Yeates (Pa.) 260 (1793). [41] 11 Mass. 396.

[42] Merrill *v.* Sherburne, 1 N. H. 204 (1819). Bill of Rights, Art. 37. See also Arts. 23 and 29.

[43] 7 Johns. (N. Y.) 498. See also 1 Comm. 455–6 and notes.

Supreme Court of the United States upon the prohibitions upon state power in the Constitution of the United States. The state had, it was always recognized, the power of eminent domain and also the power to regulate the use of property in the interest of the security, health, and comfort of its citizens,[44] that is to say, the police power, but to both these powers fundamental principles were now found to set very definite limits. Thus in Gardner *v.* Newburgh [45] Chancellor Kent ruled, upon the authority of Grotius, Puffendorf, and Bynkershoek,[46] and that of Blackstone, whom he quotes to the effect that in exercising the power of eminent domain the state is "an individual treating with an individual for an exchange," [47] that compensation was due the owner of property taken by the state even in the absence of any constitutional provision to that effect; furthermore that similar compensation was due one whose property, though not taken, was damaged by the state, and finally, by way of *dictum*, that the power of eminent domain is exercisable for "public purposes *only*." [48] The police power was similarly delimited. In the first place Kent was careful to point out that it did not extend to sumptuary legislation.[49] Again, by the followers of Kent, more zealous perhaps than their master, a distinction was drawn, upon the authority of Vattel, between regulation on the one hand, which was the true function of the police power, and on the other hand destruction, which lay without it.[50] True, the state could abate a nuisance, but only in those cases in which at the common law a private person, "taking the law into his own hands," could do so.[51] If it would go farther than this, the state could rely only upon its power of eminent domain and, by the doctrine of

[44] 2 Comm. 340.

[45] 2 Johns. Ch. (N. Y.) 162 (1819).

[46] See Grotius, De Jure Belli ac Pacis, Bk. 8, ch. 14, sec. 7; Puffendorf, De Jur. Nat. et Gent., Bk. 8, ch. 5, sec. 7; Bynkershoek, Quaest. Jur. Pub., Bk. 2, ch. 15.

[47] 1 Comm. 138.

[48] On this point see also 2 Kent, Comm. 339–40; also Varick *v.* Smith, 5 Paige (N. Y.) 146.

[49] 2 Comm. 328–30. For an instructive passage, setting forth Kent's point of view, see *ibid.* 325–6. Here Kent demurs to Blackstone's doctrine that the descent and transfer of property "are political institutions and creatures of municipal law, and not natural rights." See also *ibid.* 1.

[50] See particularly Attorney Griffin's argument in 7 Cowen (N. Y.) 592; the passage from Vattel is Bk. I, ch. 20, sec. 246.

[51] See also Justice Comstock's opinion in the Wynehamer case, reviewed below, and citations given. *Cf.* 2 Kent, Comm. 339–40.

consequential damages, must render adequate compensation for any valuable use abolished by its action.

Lastly, the doctrine of vested rights was infused by the Supreme Court into the Obligation of Contracts clause of the federal Constitution. The channel through which the doctrine was conducted to this use was furnished by the circuit courts, which in cases falling to the jurisdiction of the national judiciary because of diversity of citizenship stand in the place of the state courts and so have, from the outset, felt free to pass upon the constitutionality of state laws under the state constitution and such "general principles" as they have found those constitutions to recognize.[52] This is the explanation of such decisions as that of Patterson, J., in Van Horne *v.* Dorrance,[53] of Story in Society *v.* Wheeler,[54] and of the Supreme Court itself, speaking through Story, in Terret *v.* Taylor.[55] But the benefits of such decisions, after all, were not widespread. It was necessary, if the doctrine of vested rights was to do its full work, to enter the states themselves, and particularly was it necessary to extend the protection of the federal judiciary to legislative grants, whether of lands or charters, which, even in the states whose courts generally enforced the doctrine of vested rights, was sometimes left to the mercy of the legislatures; it being held, apparently, that what the legislature had given, the legislature could take away. In Fletcher *v.* Peck,[56] a case coming up from the circuit, Marshall achieves the deftest kind of blending of the doctrine of vested rights with the prohibition of the national Constitution of state laws impairing the obligation of contracts. In the Dartmouth College case,[57] which came up on a writ of error from a state supreme court, the same doctrine is upheld. The step was an easy one, and it was furthermore assisted by Webster's argument, a large part of which comprised Jeremiah Mason's earlier argument before the state court, invoking the doctrine of vested rights.[58] A decade

[52] See particularly Cushing, J., upon this point in Cooper *v.* Telfair; also Miller, J., in Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874), and Davidson *v.* New Orleans, 96 U. S. 97 (1877).

[53] 2 Dall. (U. S.) 309 (1795).

[54] 2 Gal. (U. S. C. Ct.) 103 (1814).

[55] 9 Cranch (U. S.) 43 (1815).

[56] 6 Cranch (U. S.) 87 (1810); see Justice Johnson's opinion in this case.

[57] 4 Wheat. (U. S.) 518 (1819).

[58] For Mason's argument and collateral matter of great interest, see Shirley, Dartmouth College Causes, in 2 So. L. Rev. N. S. 22 *et seq.* and 246 *et seq.* Webster significantly enough desired to bring the case up through the Circuit Court.

later, in 1829, Johnson, J., made an interesting confession of the motives that had guided the court in this, the most important, class of its decisions, throughout the period that was then drawing to a close. He writes:

"This court has had more than once to toil up hill in order to bring within the restriction of the states to pass laws violating the obligation of contracts, the most obvious cases to which the Constitution was intended to extend its protection; a difficulty which it is obvious might often be avoided by giving to the phrase *ex post facto* its original and natural application." [59]

The suggestion of Johnson, J., fell upon stony ground; but to-day it would be easy to imagine that the Supreme Court, in the interpretation that it began giving the Due Process of Law clause of the Fourteenth Amendment in 1890, had heard and heeded the warning of sixty years before.

But now for the purpose of this digression, which is twofold: first to indicate the point of view of the period during which the Law of the Land clause of the written constitution was first invoked as a protection of private rights against legislative power in general, and secondly, to point out that even where available, as, for example, it always was to the Massachusetts [60] and New York courts, it was not so invoked by the courts above mentioned, which instead contented themselves with drawing upon the principles of natural law and the social compact, at least so far as these principles render private property inviolate. But, of course, there had to be the notable exception to this general rule, for without it the Law of the Land clause would have had as short and inglorious a history as the initially much more promising provision respecting *ex post facto* laws.

## III.

The exception was furnished by the Supreme Court of North Carolina. At first glance this circumstance appears remarkable

[59] Note appended to his concurring opinion in Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380, 681 *et seq.* (1829).

[60] Marcy *v.* Clark, 17 Mass. 330 (1821), furnishes a good example of a case in which the phrase "law of the land" might have been used in the derived sense but is, as a matter of fact, used only in the narrow sense of procedure. In the same connection see also Rice *v.* Parkman, 16 Mass. 326.

in view of the attitude taken by that court in 1794, but upon a little investigation it is easily comprehended. In North Carolina, as in Pennsylvania, Rhode Island, and a number of the Western states, at the time judicial review was coming into general practice the creed of popular sovereignty was already in high favor;[61] accordingly it soon came to be understood in these states that judicial review rested not upon the doctrine of natural rights, its original foundation, but exclusively upon the written constitution, which was represented as an enactment of the sovereign people. But while in Pennsylvania and Rhode Island the courts, in consequence of the unavailability of such standards, felt themselves obliged to uphold all enactments of the legislature not transgressing some specific provision of the written constitution,[62] the Supreme Court of North Carolina, possessed of a more enterprising spirit, set about to discover some clause of the written instrument of sufficiently indefinite content, to accomplish the task that in Massachusetts, New York, and New Hampshire had fallen to doctrine drawn from abroad.

The pioneer case in North Carolina was that of the University of North Carolina *v.* Foy,[63] in which the constitutional issue was furnished by an act of the legislature of North Carolina repealing an earlier grant of lands to the university. In part the court rendered its decision in favor of the university upon the ground that that institution was erected in accordance with a mandate from the constitution itself and therefore stood on "higher grounds than any other aggregate corporation," but in part it relied upon the Law of the Land clause of the State bill of rights, which it found binding upon the legislature exclusively and which it defined to mean that no one should be deprived of his liberties or property without the intervention of a court of justice acting with a jury. The court says:

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[61] See 2 G. J. McRee, Life and Correspondence of James Iredell, 145–9, 169–76. Iredell's own later change of heart is shown by his opinion in Calder *v.* Bull, *supra*.

[62] Under C. J. Tilghman's leadership the Pennsylvania Supreme Court enforced the doctrine of vested rights, but under Gibson, C. J., rejected it for the doctrine of a plenary legislative power, save so far as limited by specific prohibitions of the written constitution. *Cf.* Bedford *v.* Shilling, 4 Serg. & R. (Pa.) 401 (1818), and Eakin *v.* Rauh, 12 Serg. & R. (Pa.) 330 (1825), with Watson *v.* Mercer, 1 Watts (Pa.) 330 (1833), and Menges *v.* Wertman, 1 Pa. St. 218 (1845), and note cases cited in the last case.

[63] 2 Hayw. (N. C.) 310 (1804).

"The property vested in the trustees must remain, therefore, for the uses intended for the university, until the judiciary of the country in the usual and common form pronounce them guilty of such acts as will in law amount to a forfeiture of their rights or a dissolution of their body."

University of North Carolina *v.* Foy is susceptible of two interpretations, a narrow one and a broad one. On the one hand emphasis may be laid upon the special character of the enactment overthrown and the decision classified accordingly with those reviewed above, in which the judges were endeavoring to rid legislative power of its element of prerogative by emphasizing the general character of legislation. This is the interpretation which Webster makes of the case in his argument in the Dartmouth College litigation, where he defines "law of the land" to mean the "general law," and prohibitive therefore of "acts of attainder, bills of pains and penalties . . . legislative judgments, degrees, and forfeitures." [64] A decade later Webster's language is in turn similarly interpreted by the Supreme Court of Tennessee, in the case of Van Zant *v.* Waddell,[65] in which the Law of the Land clause of the Tennessee constitution is defined to mean "a general public law equally binding upon every member of the community . . . under similar circumstances." In 1832 similar doctrine is voiced by the Supreme Court of South Carolina in the case of State *v.* Heyward,[66] where it supplements the doctrine of vested rights and the Obligation of Contracts clause of the Federal Constitution; and in 1838 the performance of the South Carolina court is exactly repeated by the Supreme Court of Maryland in the case of Regents *v.* Williams.[67] Finally, in 1843, Gibson, C. J., of Pennsylvania, who had begun his judicial career a firm believer in legislative sovereignty, — going even to the length of denying the doctrine of judicial review, — and who had always shown himself hostile to the doctrine of vested rights, was driven in Norman *v.* Heist,[68] in order to avoid too out-

[64] 4 Wheat. (U. S.) 575 *et seq.* See also *ibid.* 582, a question from Burke; Lache's second Treatise on Civil Government, § 142.

[65] 2 Yerg. (Tenn.) 260. See also *ibid.* 554; 10 Yerg. (Tenn.) 59.

[66] 3 Rich. (S. C.) 389.

[67] 9 Gill & J. (Md.) 362. The court cites University of North Carolina *v.* Foy. *Cf.* 7 Gill & J. (Md.) 191. In the latter case a special act of the legislature was overturned under the Sixth Article of the Bill of Rights, but no mention is made of the "law of the land" clause of the constitution.

[68] 5 W. & S. (Pa.) 171.

rageous consequences from a special act of the legislature, to avail himself, if only temporarily, of the Law of the Land clause of the Pennsylvania constitution, which he defined as signifying "undoubtedly a preëxistent rule of conduct, declaratory of a penalty for a prohibited act, not an *ex post facto* rescript or decree made for the occasion."

The broad interpretation of University of North Carolina *v.* Foy is to be had by disregarding the special character of the act under review and attending only to its operation upon private rights; that is, by identifying the doctrine of that decision with the general doctrine of vested rights, and so translating the Law of the Land provision into a prohibition of all retrospective legislation. In the case of Hoke *v.* Henderson,[69] moreover, decided in 1833, the Supreme Court of North Carolina itself puts exactly this interpretation upon its precedent. In that case the act in question was a statute which, in providing for the future election of court clerks, operated in some cases to displace previous incumbents by appointment. In behalf of the statute it was urged, first, that it was general in terms, "wanting in the precision and direct operation usually belonging to and distinguishing judicial proceedings," and secondly, that it was — ostensibly at least — enacted from the standpoint of the legislative view of the public interest and without any intention of passing sentence upon those detrimentally affected by it, who in fact were not charged with any delinquency: that the measure therefore was not a bill of pains and penalties and that any discussion of procedure was impertinent to the issue. Ruffing, C. J., was not much moved by these objections, but brushing them aside, proceeded to define "law of the land" to require that, before anyone shall be deprived of property, he shall have a judicial trial "according to the mode and usages of the common law" "and a decision upon the matter of rights as determined by the law under which it [the property] vested." The final clause of this definition is the notable part of it; for if it be taken literally it means that, with reference to any particular property right, the existent law is elevated to the position of a constitutional limitation upon the body which enacted it and can never be altered to the diminution of that right. Nor does the court apparently shrink from this result; for it says, it is true that "the whole community may modify the rights which persons

[69] 2 Dev. (N. C.) 1.

can have in things or at its pleasure abolish them altogether," but it hastens to add that the community speaks only through the constitution.

Some five years following Hoke *v.* Henderson occurred the Alabama case of *Ex parte* Dorsey,[70] which is notable for a number of reasons: First, because by the decision in it the doctrine of the Tennessee court in Van Zant *v.* Waddell is expanded, under color of warrant from the first article of the Alabama Bill of Rights, into a condemnation of legislation affecting detrimentally, not merely particular persons, but particular classes; secondly, because in the opinion of Ormond, J., the much more precise phrase "due course of law" is used as the equivalent of the phrase "law of the land"; and thirdly, because in the same opinion the term "property" in the Due Course of Law provision takes on a greatly expanded meaning, connoting not merely, like the phrase "vested rights," tangible property or specific franchises or remedies, but the general rights of an individual as a member of the community. The act under review in *Ex parte* Dorsey provided among other things that an attorney at law should be required, as a prerequisite condition to his practicing in the courts of the state, to take an oath asserting not only that he would not in the future participate in a duel in any capacity, but that he had not done so in the past. This rather harsh provision was placed by its defenders upon one or more of three grounds: first, that attorneys were public functionaries and that therefore the legislature has, under the constitution, the express right to prescribe their qualifications; secondly, upon the ground that it was penal legislation such as the constitution explicitly required the legislature to enact for the suppression of duelling; thirdly, upon the ground that the legislature had enacted it by virtue of its general power to provide for the moral welfare of the community. The point of view of the majority of the court in overturning the provision in question is indicated by its use of the final clause of the bill of rights, containing the usual *caveat* that enumeration of certain rights should not be construed to disparage other rights not so enumerated, in such a way as virtually to convert the constitution of the state into a grant of powers. They therefore insist upon treating the act under review — having swept aside the contention that attorneys are public functionaries — as a

[70] 7 Porter (Ala.) 293.

bill of pains and penalties, aimed at a particular class in the community. The measure is held, therefore, to fall under the condemnation of the first article of the bill of rights and the constitutional guaranty of a trial by jury, and by Ormond, J., who is sure that the right to practice law is "as deserving of protection as property," or at least is an element of the inalienable right to pursue happiness, under that of the "due course of law" clause. Collier, J., dissented, upon the ground that the state constitution is not a grant of powers but an organization of inherent powers, which accordingly are available to the legislature unless specifically withheld. The "due course of law" clause has therefore no independent force as a limitation upon the power of the legislature. It means such "forms of arrest, trial, and punishment" as are "guarantied by the Constitution, or provided by the common law, or else such as the legislature, in obedience to constitutional authority, have enacted to insure public peace or elevate public morals." Two years later we find Ormond, J., essentially disavowing his doctrine in this case and adopting that of his dissenting associate.

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[*To be continued.*]